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FM AMEMBASSY NAIROBI
TO RUEHC/SECSTATE WASHDC 5888
INFO RUCPDOC/DEPT OF COMMERCE WASHDC
RUEATRS/DEPT OF TREASURY WASHDC

UNCLAS NAIROBI 001325

STATE FOR EB/IFD/OIA HEATHER GOETHERT AND KIMBERLY BUTLER, AND L/CID
GABRIEL SWINEY AND CAMERON HOLLAND

STATE ALSO FOR AF/E AND AF/EPS

USDOC FOR 3131/USFCS/OIO/RD/ANESA

SIPDIS

SENSITIVE

E.O. 12958: N/A

TAGS: KIDE EINV OPIC CASC PGOV KE

SUBJECT: 2008 REPORT ON INVESTMENT DISPUTES AND EXPROPRIATION
CLAIMS - KENYA

REFS: (A) STATE 43784 (B) 05 NAIROBI 3255

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ACCORDINGLY.

¶1. (U) The U.S. Mission in Kenya is aware of one (1) outstanding
claim of a United States business interest against a branch of the
Government of Kenya (GOK).

¶2. (U) Background: In the mid-1990s, Claimant A entered into a
partnership with a Kenyan public university ("the university"), via
a Memorandum of Agreement (MOA), to establish computer instruction
centers. This partnership sought to impart computer skills to
Kenyan students and over the years expanded to several centers
across the country, using U.S. expertise, intellectual property, and
technology supplied by Claimant A to staff and run the curriculum.

¶3. (SBU) According to Claimant A, the partnership ran successfully
for seven years when, in June 2003, the university, citing
management irregularities, unilaterally took over the entire
enterprise. Though the university agreed in principle to proceed to
arbitration, as provided for by the MOA that established the
partnership, the arbitration process has yet to commence, despite
the significant efforts that U.S. Embassy officers, including the
previous U.S. Ambassador and several Senators and Members of
Congress have expended in pursuit of a satisfactory resolution since
the management takeover.

¶4. (SBU) At the time of the university takeover, Claimant A
contends it had invested approximately KSh 35 million (USD 500,000),
but had only recouped about 50% of this amount. Furthermore,
Claimant A estimates a loss of investment in excess of USD 5 million
when projected revenues are considered and also estimates that the
university is currently collecting in excess of KSh 100 million (USD
1.43 million) annually from the IT Learning Center, based at its
campus in Juja Town, and from 16 other accreditation centers in
Nairobi. Finally, according to Claimant A, the university has also
set into motion plans to develop a technology park, a project
concept that had been envisioned for implementation at some later
phase within the spirit of the joint MOA. Claimant A asserts that
the university needs to reverse its suspension of the MOA or provide
financial compensation.

¶5. (SBU) U.S. Mission Actions on Behalf of U.S. Claimant: In June
2003 Claimant A formally sought U.S. Embassy Nairobi intervention in
its dispute with the Kenyan university, citing a unilateral breach
of the parties' MOA and claiming that Claimant A's interest in the
partnership had been expropriated. Subsequently, Embassy officials

contacted GOK counterparts on Claimant A's behalf and persuaded the university to submit the case to arbitration, as agreed in the MOA. The Embassy has also signaled to the GOK the desirability of an early and, if possible, amicable settlement of this dispute on many occasions. To date, Claimant A has refused to engage local counsel or pursue this case in the Kenyan legal system. Claimant A has also refused to accept the university's offer of arbitration under the MOA's terms.

¶6. (SBU) As part of a March 20, 2007 conference call, Claimant A's president requested that the U.S. Ambassador intervene in the matter. Claimant A's local representative also participated in the conference call. In response, on April 24, 2007, the Ambassador wrote to the Kenyan Minister of Education, requesting the reinstatement of the MOA by the Kenyan university. A copy of this letter was also sent to the then Minister of Internal Security because Claimant A's president believes the former Internal Security Minister can assist in facilitating a decision that would bring both parties closer to a negotiated resolution. U.S. Embassy Foreign Commercial Service (FCS) officers have followed up with contacts in both the Education and Internal Security ministries but have yet to receive a concrete reply to the Ambassador's letter. U.S. Embassy officers have met and corresponded with Claimant A's local representative on several occasions.

¶7. (SBU) On July 11, 2007, Claimant A's president contacted U.S. Embassy FCS following an "East African Standard" article alleging corruption at the university. U.S. Embassy Charg d'Affaires spoke with Claimant A's president on July 12 and held a follow-up meeting with Claimant A's representative in Kenya on July 13. The Charg d' Affaires reiterated that, while the U.S. Embassy would continue to seek a negotiated political solution to this dispute, Claimant A ought to pursue local legal remedies and/or international

arbitration, which Claimant A has thus far refused to do.

¶8. (SBU) On September 10, 2007, Claimant A's president held a conference call with then Acting Deputy Chief of Mission (DCM) and FCS staff, during which he indicated that he no longer wished to pursue a negotiated solution to his claims against the university. Claimant A's president requested a determination by the USG that his assets had been expropriated. In a September 21, 2007 letter from the Ambassador to Claimant A's president, and a subsequent conference call involving both parties on October 4, 2007, the Ambassador reviewed USG policy on expropriation in detail to Claimant A. The Ambassador explained that U.S. investors must exhaust all local remedies or prove the futility of pursuing such remedies prior to claiming expropriation. Since the October 4, 2007 conference call with the Ambassador, Claimant A's president has to date neither initiated local legal action to seek redress or initiated international arbitration, nor initiated negotiations with the University to reach a settlement. (U.S. Embassy officers continue to maintain regular contact with Claimant A's local representative).

¶9. (SBU) On May 14, 2008, the DCM sent Claimant A's president a letter clarifying that the Counselor for Commercial Affairs is Claimant A's principal point of contact. The DCM asked that Claimant A henceforth communicate any changes in this case to the Foreign Commercial Section of the Embassy.

¶10. (SBU) Claimant's Name:

Claimant A: Nebraska-based Micro-Mini Systems (MMS)

University: Jomo Kenyatta University of Agriculture and Technology (JKUAT)

¶11. (U) Primary U.S. Mission contacts:
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